

This appeal stems from a review and modification proceeding initiated by respondent. The parties litigated this claim and in an October 16, 2006, Award, claimant was awarded benefits for a 45 percent permanent partial general disability under K.S.A. 44-510e for bilateral upper extremity injuries. In arriving at that conclusion, the Judge impliedly found claimant's injuries were not included in the schedule of K.S.A. 44-510d and that claimant was not permanently and totally disabled.

In light of the Kansas Supreme Court's subsequent decision in *Casco*,¹ which held bilateral upper extremity injuries should be compensated as two scheduled injuries under K.S.A. 44-510d rather than as an unscheduled injury under K.S.A. 44-510e, respondent filed an application for review and modification. In the November 19, 2007, Review & Modification Award, Judge Clark denied respondent's request to modify the initial Award. Judge Clark ruled the finding in the October 16, 2006, Award that claimant's permanent injuries were to be compensated under K.S.A. 44-510e as an unscheduled injury should not be modified under the doctrine of *res judicata*.

Respondent contends Judge Clark erred. Respondent argues the October 16, 2006, Award should be modified as it does not comport with the law set forth in *Casco* and, therefore, claimant's permanent partial general disability benefits are excessive. Respondent argues *res judicata* does not apply as the doctrine "does not apply to the determination of [a]wards which are subject to review and modification."² In addition, respondent argues the doctrine does not apply as respondent is not seeking to relitigate the degree of claimant's disability but, instead, simply seeks recalculation of the October 16, 2006, Award using the law set forth in *Casco*. In its brief to the Board, respondent argues, in part:

There is no dispute that the present Application for Review and Modification does not involve a change of condition of claimant. Moreover, respondent does not seek to re-litigate issues of compensability, employer or employee status or even degree of disability. Respondent simply asks the finder [of] fact to recalculate the Award based upon the correct analytical method announced by the Court in *Casco v. Armour Swift-Eckrich*.³

In short, respondent requests the Board to modify the October 16, 2006, Award and grant claimant permanent disability benefits under the schedule of K.S.A. 44-510d for a 5.3 percent impairment to the left upper extremity and a 5.3 percent impairment to the right upper extremity.

Claimant requests the Board to affirm the November 19, 2007, Award denying respondent's request to modify the October 16, 2006, Award. Claimant argues the law set forth in the *Casco* decision should only be applied prospectively. Claimant agrees with respondent that there has been no change in claimant's condition or disability. Finally, claimant concluded her brief to the Board as follows:

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

² Respondent's Brief at 2 (filed Jan. 7, 2008).

³ *Id.* at 3.

Administrative Law Judge John Clark concluded in his Review and Modification Award that the doctrine of *res judicata* applies and respondent's request for review and modification should be denied. The parties in this case relied upon the law as it existed at the time the case was litigated and submitted to the Administrative Law Judge for a decision. Modification of the [October 16, 2006,] award which was entered five (5) months prior to **Casco** would be unjust.⁴

The issues before the Board on this appeal are:

1. Is respondent entitled to a review of the initial finding that claimant's bilateral upper extremity injuries were outside the schedule of K.S.A. 44-510d and, therefore, those injuries were to be compensated under K.S.A. 44-510e?
2. If so, how should the October 16, 2006, Award be modified?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes the November 19, 2007, Review & Modification Award should be affirmed.

In the October 16, 2006, Award, Judge Clark found claimant sustained permanent injuries to her bilateral upper extremities and, following precedent, awarded claimant permanent disability benefits under the formula set forth in K.S.A. 44-510e. That Award was not appealed.

On March 23, 2007, the Kansas Supreme Court rendered the *Casco*⁵ decision, which set aside 75 years of precedent by holding bilateral upper extremity injuries were no longer to be compensated as an unscheduled injury under K.S.A. 44-510e. Instead, the Supreme Court held those injuries were to be compensated as two separate injuries under the schedule of K.S.A. 44-510d.

Respondent then initiated this review and modification proceeding to modify the October 16, 2006, Award that was entered in this claim. Respondent does not allege there has been any change in claimant's permanent impairment, post-injury earnings, or work status. Respondent's sole reason for seeking modification of the October 16, 2006, Award is that claimant's permanent disability benefits are excessive as *Casco* changed how claimant's bilateral upper extremity injuries should be compensated.

⁴ Claimant's Brief at 3 (filed Jan. 18, 2008).

⁵ *Casco*, *supra*.

The Workers Compensation Act provides that any party to the workers compensation proceeding may request review and modification of an award. The review and modification statute provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.⁶

Not all findings, however, may be reviewed. The Kansas Supreme Court in *Randall*⁷ held that findings of past fact are not subject to review. An exception exists, however, when an award has been obtained by fraud or undue influence, neither of which has been alleged in this claim.

The Board concludes *res judicata* precludes modifying the October 16, 2006, Award as respondent seeks to modify a finding regarding a past fact. Before awarding permanent disability benefits in any workers compensation proceeding, the judge must first decide whether an injury is included in the schedule of K.S.A. 44-510d. That is a combined question of law and fact.

In the October 2006 Award, the Judge determined claimant's bilateral upper extremity injuries were not included in the schedule of K.S.A. 44-510d and, therefore, found those injuries were to be compensated under K.S.A. 44-510e. When respondent did not appeal the October 16, 2006, Award, those findings became final. To now litigate whether claimant's injuries were or were not included in the schedule of K.S.A. 44-510d is relitigating a past fact.

⁶ K.S.A. 44-528(a).

⁷ *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 510 P.2d 1190 (1973).

Moreover, when respondent failed to appeal the October 16, 2006, Award, the finding that claimant's bilateral upper extremity injuries were to be compensated under K.S.A. 44-510e rather than under K.S.A. 44-510d became the law of the case. And the law of the case is not an element that can be modified or changed in a review and modification proceeding.

In *Collier*,⁸ the Kansas Supreme Court stated:

The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:

"The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."

. . . .

The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

And in *Finical*,⁹ the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

Finally, judicial decisions that cause substantial hardship or injustice are to be applied only prospectively. The Kansas Supreme Court in *McDowell*¹⁰ addressed whether a United States Supreme Court decision regarding due process should be applied retroactively or prospectively. The Kansas Supreme Court reiterated the following rule:

⁸ *State v. Collier*, 263 Kan. 629, 631, 632, 952 P.2d 1326 (1998).

⁹ *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

¹⁰ *In re Estate of McDowell*, 245 Kan. 278, 777 P.2d 826 (1989).

A judicial decision may be applied prospectively only if: (1) the decision establishes a new rule of law; (2) retroactive application would not further the principle on which the decision is based; and (3) retroactive application would cause substantial hardship or injustice.¹¹

As indicated above, the *Casco* decision changed the interpretation of the law regarding bilateral extremity injuries. Should the rule in *Casco* be applied retroactively, the Board estimates there are hundreds of claims in which the parties could seek review and modification of an award based upon the new interpretation of the law. And not only would the earlier awards be subject to modification, but it is also possible there would be innumerable claims initiated against the Workers Compensation Fund for the reimbursement of benefits that were allegedly wrongly paid. Moreover, the Board finds there would be inequities and hardship should *Casco* be applied retroactively. In the earlier claims, the parties evaluated their positions and litigated those claims under the law in effect at that time. Who is to say the parties would not have adopted different trial strategies or sought to develop different evidence had the claim been tried under *Casco*? For example, an injured worker is now behooved to utilize the “situs of the disability” rule¹² to attempt to establish an unscheduled injury as compared to the pre-*Casco* era when the additional expense and effort may not have been justified.

In summary, the Board concludes review and modification is not appropriate in these circumstances. The review and modification statute was primarily intended to correct original awards of compensation that later proved unjust because of a change in a worker’s condition or circumstances¹³ or because of fraud, undue influence, or serious misconduct. But none of those factors apply to the present circumstances. Accordingly, the Board affirms the November 19, 2007, Review & Modification Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

¹¹ *Id.* at Syl. ¶ 2.

¹² In determining whether a worker has sustained a scheduled or an unscheduled injury it is the situs of the resulting disability, not the situs of the trauma, that controls. See *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986) and *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

¹³ See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

¹⁴ K.S.A. 2006 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board affirms the November 19, 2007, Review & Modification Award entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge